Supreme Court, U.S.
FILED
SEP 12 2004
OFFICE OF THE CLERK

(13) (12)

Nos. 04-104 and 04-105

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

FREDDIE J. BOOKER, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

UNITED STATES OF AMERICA, *Petitioner*,

v.

DUCAN FANFAN, *Respondent.*

On Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The First Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
Carol A. Brook, *President*
Henry J. Bemporad
Frances H. Pratt, *Co-Chairs*,
Amicus Committee

PAUL M. RASHKIND
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public
Defender
150 West Flagler Street, Ste 1500
Miami, Florida 33130
(305) 536-6900

QUESTION PRESENTED

Whether the principles of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), assimilate readily into practice under the United States Sentencing Guidelines.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

One of the guiding principles of the Association is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.[2]

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the National Association of Federal Defenders, its members or its counsel, made any monetary contributions to its preparation or submission. *See* Sup. Ct. R. 37.6. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Sup. Ct. R. 37.3(a).

[2] Published decisions in which the Association has appeared as *amicus curiae* include: *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Massaro v. United States*, 538 U.S. 500 (2003); *Carey v. Saffold*, 536 U.S. 214 (2002); *Pacheco-Camacho v. Hood*, 535 U.S. 1105 (2002) (*mem.*); *United States v. Vonn*, 535 U.S. 55 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *Newland v. Saffold*, 534 U.S. 971 (2001); and *In re Olabode*, 325 F.3d 166 (3d Cir. 2003). The Association also appears as *amicus curiae* in *Kowalski v. Tesmer*, No. 03-407, presently pending before the Court.

The pending cases raise important questions that impact federal criminal practice, from indictment through trial – or, as is much more often the case, through plea negotiation – and sentencing under the United States Sentencing Guidelines. As *amicus curiae*, the Association offers its practical view of the federal criminal justice system, seen through the eyes of counsel who represent a majority of those charged with federal crimes in districts throughout every federal circuit.

SUMMARY OF ARGUMENT

Opponents of *Blakely v. Washington,* 124 S. Ct. 2531 (2004), raise the spectre of chaos as a reason to revisit the decision or to hold it inapplicable to the federal sentencing scheme. For those who practice criminal law in the federal courts every day, the only chaos has been caused not by applying *Blakely* to federal criminal cases, but rather by those trying to avoid its application or to force its reconsideration.

The requirements of *Blakely* are assimilated readily into the federal sentencing scheme, with little or no change to current statutes or rules, providing sentences entirely consistent with the Sentencing Reform Act of 1984 and the United States Sentencing Guidelines. For over 97% of federal sentencings – those arising from guilty pleas – the only change required by *Blakely* is that indictments must now allege any fact (other than the fact of a prior conviction) that increases the statutory maximum penalty. There are no structural or practical impediments to this requirement, which has already been satisfied in districts throughout the country.

Nor are there legal or practical impediments to assimilating *Blakely* in the small percentage of cases that go to trial. Trial

juries will be empaneled, hear proof, and return verdicts, based on a reasonable doubt standard. With such verdicts, the trial court actually has simpler sentencing obligations, filtered by the jury's findings, which will yield the appropriate guideline range.

Real-world experience dispels the myths imagined by those who choose to avoid *Blakely* and its application in federal sentencings. In the end, *Blakely* will improve federal guidelines sentencing by increasing the accuracy of factfinding, reducing unwarranted sentencing disparities, and enhancing the public reputation of the federal sentencing process.

ARGUMENT

THE PRINCIPLES OF *BLAKELY V. WASHINGTON* ASSIMILATE READILY INTO PRACTICE UNDER THE UNITED STATES SENTENCING GUIDELINES

A. *Blakely* culminates from a succession of the Court's decisions applying to sentencings the protections of the Fifth and Sixth Amendments.

Blakely v. Washington, 124 S. Ct. 2531 (2004), is the culmination of five decisions delivered by the Court during the past five years, reiterating that sentencing in criminal cases must operate within the limits of the Fifth and Sixth Amendments. Each decision built on its predecessors and brought gre r clarity to the requirements imposed by these constitutiona. provisions.

In *Jones v. United States*, 526 U.S. 227 (1999), the Court stated that the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that

"any fact (other than prior conviction) that increases the maximum penalty for a federal crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." 526 U.S. at 243 n.6.

Apprendi v. New Jersey, 530 U.S. 466 (2000), followed a year later, and applied the constitutional principle announced in *Jones* to state court sentencing: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Two years later, the Court made clear that, in applying *Apprendi* "[i]n federal prosecutions, such facts must also be charged in the indictment." *United States v. Cotton*, 535 U.S. 625, 627 (2002). During that same Term, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to death penalty determinations.

And last Term, *Blakely v. Washington* refined and applied *Apprendi*'s rule, defining "statutory maximum" in a determinate sentencing scheme as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 124 S. Ct. at 2537 (emphasis in original). It "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." 124 S. Ct. at 2537. To the extent a judge sentences above the statutory maximum, based on facts not found by a jury (or conceded by the defendant), "the judge exceeds his proper authority." *Id.*

As the Court decided each case, a gradually increasing chorus of doomsayers predicted chaotic courtrooms and the demise of determinate sentencing schemes. Yet, the culmination

of the decisions, and their application to federal sentencing, brings neither chaos nor the guidelines' demise. To the contrary, *Apprendi* jurisprudence does not inexorably overrule determinate sentencing, but simply causes it to be "implemented in a way that respects the Sixth Amendment," *Blakely*, 124 S. Ct. at 2540, by processes for which the criminal justice system is well-suited.

Together, *Jones*, *Apprendi*, *Cotton*, *Ring*, and *Blakely* recognize four important Fifth and Sixth Amendment principles applicable to federal sentencing:

> First, enhancing facts that increase the statutory maximum sentence must be alleged in the indictment.
>
> Second, the government must prove those allegations – like any other allegations of an indictment – beyond a reasonable doubt.
>
> Third, the jury must find the existence of the facts beyond a reasonable doubt.
>
> Fourth, a court may not sentence a convicted defendant in excess of the statutory maximum for any fact not indicted, proved beyond a reasonable doubt, and found by a jury verdict.[3]

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[3] The four principles have these caveats: If the fact is indicted and its proof conceded by the defendant, further proof and jury finding on that factor are unnecessary, and a sentencing judge may take the fact into account in imposing a sentence above the statutory maximum. *Blakely*, 124 S. Ct. at 2541. Likewise, a defendant may consent to judicial factfinding in place of a jury determination. *Id.*

Each of these principles is readily applied under the United States Sentencing Guidelines, although in the real world, only the first principle has universal application.

B. For over 97% of all federal sentencings – those in which defendants plead guilty or no contest – the sole impact of assimilating *Blakely* into the federal sentencing scheme is that indictments must allege any enhancing facts (other than the fact of a prior conviction) that affect the statutory maximum sentence.

The overwhelming majority of federal prosecutions are resolved by guilty or no contest pleas. According to the most recent available statistics, 97.1% of all federal sentencings follow guilty pleas, with the remaining 2.9% following trial.[4] This striking contrast is not new, but rather is part of a long-term trend,[5] a trend that has continued – indeed accelerated – despite the assimilation of the Court's decisions in *Jones*, *Apprendi*, *Cotton* and *Ring*. This reality must be considered in gauging the true impact of now assimilating *Blakely* into the federal sentencing scheme.

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[4] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2002) (Table 11).

[5] During the past decade, the percentage of pleas has increased from 91.9% in 1995, to 97.1% in 2002. Remarkably, the concomitant reduction in trial dispositions – from 8.1% to 2.9% – has occurred despite the application of *Apprendi*'s requirements to federal drug trafficking prosecutions. *Compare* U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (1995) (Table 3) *with id.* (2002) (Table 11).

Guilty plea dispositions implicate only one of *Blakely*'s requirements: An indictment must allege all enhancing facts (other than the fact of a prior conviction) that might affect the statutory maximum sentence. Despite the naysayers' protestations, there are neither legal nor practical impediments to *Blakely*-ized indictments.

Federal Rule of Criminal Procedure 7 implements the requirement of the Fifth Amendment's indictment clause. 1 Charles Alan Wright, *Federal Practice and Procedure: Criminal* § 125 (3d ed. 1999). The rule "put an end to 'the rules of technical and formalized pleading which had characterized an earlier era,'" *id.* § 123, at 529 (quoting *Russell v. United States*, 369 U.S. 749, 762 (1962)), replacing those arcane requirements with a simplified procedure in which "common sense and reason prevail over technicalities." *Id.* § 123, at 530-31. The rule requires an indictment or information to be "a plain, concise, and definite written statement of the *essential facts* constituting the offense charged." Fed. R. Crim. P. 7(c)(1) (emphasis added). Although the rule requires that elements of the charged crime be included, there is no prohibition on including relevant and material non-elemental facts.[6]

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[6] The rule accords with the Constitution, which, far from barring indictment allegations other than those elements contained in the statute, sometimes requires them. *See, e.g.*, *Russell*, 369 U.S. at 765 (requiring more than statutory language to provide required notice); *cf. Stirone v. United States*, 361 U.S. 212 (1960) (only grand jury may change allegation of means of committing offense); Brief for United States at 16 n.4, *United States v. Cotton*, 535 U.S. 625 (2002) (No. 01-687) ("The conclusion that under *Apprendi* threshold drug quantities must be charged in a federal indictment and proved to the jury in order to support a sentence above the otherwise-applicable statutory maximum does not require a determination that drug quantity is formally an 'element' of the offense under Section 841 or Section 846.").

Subsection (d), which permits surplusage to be stricken from the indictment upon motion of the defendant, is "strictly construed against striking surplusage," *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974), and for that reason "only rarely has surplusage been stricken." Wright, *supra*, § 127, at 639. By design and by its terms, the rule is one of inclusion and simplification, not exclusion for the sake of complication. Indeed, that has long been the view of the U.S. Department of Justice in its policy and practice.

The *Department of Justice Manual* recognizes that proper allegations in an indictment are not limited to only the statutory elements of an offense. *See* 3 *Department of Justice Manual*, Title 9, Resource Manual, Criminal, No. 214 (Drafting Indictments and Informations) (Aspen Law & Business 2002). It offers prosecutors no fewer than five separate form responses to defense motions to strike surplusage, each setting forth law and argument permitting non-elemental facts to be alleged in an indictment. *See* 2 *id.*, Resource Manual, Title 4, Civil, Nos. 127, 128, 129, 130, 133. Many of the boilerplate legal responses demonstrate, through law and argument, why the types of enhancing facts that *Blakely* affects are eligible for inclusion in an appropriate indictment simply because they are "legally relevant." *Id.* at 4-530, 4-533. Examples of permissible non-elemental allegations include background information, like "reference to the Bonanno family of La Cosa Nostra," "anti-bugging equipment," or "organized crime;" relevant conduct, such as "allegations of drug trafficking and narcotics transactions in a mail fraud indictment," or "references to an inmate awaiting trial for narcotics offense;" victim impact, like "allegations that the diverted funds were destined for the poor and homeless and that rightful recipients were lulled and deceived;" and leadership and other roles in the offense, like "a Means and Manners section . . . explaining the . . . roles of each

defendant within the organization." *Id.* at 4-528, 4-531, 4-533, 4-536, 4-537. These and many other non-elemental allegations were upheld, at the government's urging, because they were "legally relevant" and "material." Of the many cases cited in the form government responses, the one relied upon most often is *United States v. Climatemp, Inc.*, 482 F. Supp. 376, 391 (N.D. Ill. 1979), *aff'd mem.*, 705 F.2d 461 (7th Cir.), *cert. den. sub nom. Fakter v. United States*, 462 U.S. 1134 (1983), which the government summarizes as: "[I]ndictment language the government hopes to prove at trial cannot be considered surplusage, no matter how prejudicial it may be, if it is legally relevant." Resource Manual, Title 4, Civil, at 4-529, 4-533.

In this light, one cannot seriously suggest that enhancing facts relating to drug quantity, financial loss or gain, role in the offense, victim status, or relevant conduct are surplusage in an indictment when proof of those facts determines the degree of punishment in the event of conviction.

Actual practice confirms this conclusion. After the Court decided *Blakely*, the Department of Justice issued to all federal prosecutors at least two memoranda, one from Deputy Attorney General James Comey and the other from Assistant Attorney General Christopher A. Wray, offering guidance on post-*Blakely* practices.[7] "Until the Supreme Court definitively rules on the constitutional impact of *Blakely* on the Guidelines," the Comey memorandum directs all federal prosecutors to conform indictment practices to *Blakely*:

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[7] Although the Wray memorandum cautions in a footnote that it should not be disseminated outside of DOJ, it is posted publicly on the Internet at http://sentencing.typepad.com and has been made available to the federal judiciary on the JNET, http://jnet.ao.dcn/Memos/2004_Archive/Dir4092.html.

1. Indictments. Prosecutors should immediately begin to include in indictments all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules). . . . [I]n light of the unpredictable future path of court rulings, it is prudent for the government to protect against the possibility that such allegations in indictments will be held necessary.

2. Superseding indictments. In pending prosecutions that have not resulted in a plea of guilty or a trial, prosecutors should obtain superseding indictments that allege all readily provable Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from the *Blakely* and *Apprendi* rules).

Memorandum from James Comey, Deputy Attorney General, U.S. Department of Justice, to All Federal Prosecutors, re: Department Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004), at 3, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_blakely_memo_7204.pdf.

The second memorandum, issued only a few days later, offered the same advice in greater detail and made a candid admission about the government's ability to adapt to *Apprendi*'s indictment requirements:

> **Procedures That *Blakely* Would Require.** Any fact to which *Blakely* applies must be charged in the indictment, and either found by a jury beyond a reasonable doubt or admitted by the defendant. *Blakely*,

> 2004 WL 1402697, at *4; *United States v. Cotton*, 535 U.S. 625, 627 (2002) (indictment requirement applies in federal prosecution).
>
> After *Apprendi* was decided, we were able to reduce the impact of the decision by immediately beginning to charge and prove to the jury facts that increase the statutory maximum – for example, drug type and quantity for offenses under 21 U.S.C. 841.

Memorandum from Christopher A. Wray, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to All Federal Prosecutors, re: Guidance Regarding the Application of *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004), to Pending Cases (undated), at 8, *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf. To that end, the Wray memorandum directed prosecutors on the procedures for *Blakely*-izing indictments and informations:

> **A. Indictments and Informations.** Prosecutors should immediately begin to include in indictments all Guidelines upward adjustment or upward departure factors (except for prior convictions that are exempt from *Blakely* and *Apprendi* rules) that are readily provable beyond a reasonable doubt. Facts that will need to be alleged may include Chapter Two factors that determine the base offense level (including relevant conduct), Chapter Two specific offense characteristics, Chapter Three upward adjustments, and Chapter Five departure grounds. In a drug case, for example, this might include the quantity of drugs as set forth in the drug quantity table of Guidelines § 2D1.1(c) (for example, that the defendant distributed at least 2 kg but

less than 3.5 kg of cocaine, which would result in an offense level of 28), that a dangerous weapon was possessed (Guidelines § 2D1.1(b)(1)) and that the defendant was an organizer or leader of criminal activity that involved five or more participants (Guidelines § 3B1.1(a)). Prior convictions do not need to be alleged in the indictment, but prosecutors should allege facts other than prior convictions that increase a defendant's criminal history score and are readily provable beyond a reasonable doubt. The allegations of enhancement factors should track the language of the applicable Sentencing Guidelines. Prosecutors may also choose to allege Guidelines enhancements in informations where the defendant has agreed to enter a guilty plea and to waive indictment, but has not agreed to waive his *Blakely* rights.

> If a defendant has already been indicted but has not yet gone to trial or pleaded guilty, prosecutors should supersede the indictment to allege Guidelines factors. The Criminal Division will prepare and distribute sample indictments.

Id. at 9.

Indictments complying with *Blakely*'s requirements (and DOJ policy) have been returned nationwide, from the prosecution of the biggest and most infamous fraud case to the most obscure and routine cases. For example, the superseding indictment in the Enron fraud prosecution, 132 numbered paragraphs spanning 65 pages, concludes with four paragraphs identifying a smorgasbord of enhancements: leadership role, abuse of trust, special skills, facilitation to conceal, loss amount exceeding $100 million, more than minimal planning, a scheme

to defraud more than 50 victims, sophisticated means, commission through mass marketing, offenses affecting a financial institution, gross receipts of over $1 million; funds values in excess of $6 million; and, as to counts 38-41, gain exceeding $60 million, and more than minimal planning. *United States v. Richard A. Causey, Jeffrey K. Skilling, and Kenneth L. Lay*, Cr. No. H-04-25(S-2) (S.D. Tex. July 7, 2004), *available at* http://news.findlaw.com/hdocs/docs/enron/usvlay70704 ind.pdf.

More routine cases provide everyday examples of *Blakely*'s application to superseding indictments. In a two-defendant, eight-count tax fraud prosecution, the superseding indictment concludes with eight double-spaced lines alleging that the defendants had a leadership role in criminal activity involving "less than five members" that "was not otherwise extensive;" the defendants were in the business of preparing tax returns; and their conduct resulted in loss exceeding $80,000.00. *United States v. Richard Casseus and Shretta Renee Casseus*, No. 04-20047-CR-MARTINEZ (s) (S.D. Fla. July 29, 2004), *available at* http://pacer.flsd.uscourts.gov (Local Option Images).

In a single-defendant, two-count prosecution charging the defendant with being both a felon and an unlawful drug user in possession of a firearm and ammunition, each count of the second superseding indictment makes the traditional charge and adds enhancement fact allegations that the possession was "in connection with a robbery and a first degree and second degree murder, including felony murder." *United States v. Joseph E. Williams*, No. 04-160-A (E.D. Va. July 15, 2004) (on file with counsel), *available at* http://pacer.vaed.uscourts.gov.

And, in a one-count superseding indictment for interstate transportation of pornography involving minors, the

government added factual allegations that raise the guideline range because the material involved a prepubescent minor under the age of 12 years, distribution to a minor, the material portrayed sadistic and masochistic conduct and other depictions of violence, and because distribution was committed by use of a computer. All of the enhancing facts were alleged in a total of nine double-spaced lines. *United States v. Russell Wallace*, No. 04-14034-CR-MARRA/LYNCH (s) (S.D. Fla. Aug. 5, 2004), *available at* http://pacer.flsd.uscourts.gov (Local Option Images).

These few selected indictments illustrate a wealth of facts that, if proved beyond a reasonable doubt, would raise the statutory maximum sentence set by the U.S. Sentencing Guidelines. And they illustrate how simply and routinely *Blakely* has already assimilated into practice in federal court.

To the extent a defendant faces punishment beyond the otherwise applicable maximum, it will be because the grand jury and the prosecutor determined it is warranted. If the enhancing facts are not part of the ultimate charge and sentence, it will be because the grand jury found proof of the enhancing fact wanting, or due to the exercise of prosecutorial discretion. As the Court observed in *United States v. LaBonte*, 520 U.S. 751 (1997), such prosecutorial discretion remains a vital component within the federal guidelines scheme:

> Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. Such discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors.

520 U.S. at 761-62; *see also Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576, 2590 (2004) ("The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion.").[8]

Thus, the first requirement of *Blakely*, that enhancement facts should be charged by indictment, is legally permissible and practicable. For the 97% of federal cases in which defendants plead guilty or no contest, the other requirements of *Blakely* are met by virtue of their plea. Under Federal Rule of Criminal Procedure 11(b)(1), defendants who plead guilty will be advised of the nature of the charges against them, their rights to jury trial and procedures to defend against the charges, and that their plea waives all of those rights. When the district court accepts the plea under the terms of Rule 11, the remaining requirements of *Blakely* – a jury trial with proof of all

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[8] *Labonte*'s recognition of prosecutorial discretion also disposes of any concern that *Blakely* will cause unseemly sentencing disparity because some defendants will be indicted for enhancement conduct whereas others will not. *Labonte* addressed this argument in the context of the comparable effect of 21 U.S.C. § 851(a)(1) enhancement notices. Rejecting the significance of the similar disparity created because some defendants receive enhancement notices while others do not, the Court relied upon traditional precepts of prosecutorial discretion: "Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice is a foreseeable – but hardly improper – consequence of the statutory notice requirement." 520 U.S. at 762.

allegations of the indictment beyond a reasonable doubt – are waived and the sentencing proceeds within the limits of crimes and factors alleged in the indictment. *See Blakely*, 124 S. Ct. at 2541.

Those who predict chaos rejoin by predicting that *Blakely* will cause an increase in trials and a decrease in plea negotiations. Although such concerns cannot override constitutional requirements, *see Blakely*, 124 S. Ct. at 2543, the claim itself is statistically unfounded and counterintuitive. Despite *Apprendi*, which required new allegations and proof in federal prosecutions, the number and percentage of criminal trials have *decreased*, not increased. *See supra* note 5. The most dramatic effect of *Apprendi* has been on federal drug prosecutions, *see Cotton*, yet trials have decreased even in those cases. *Apprendi* was decided on June 26, 2000. In the prior year, 1999, there were 1,359 drug trafficking trials, 6.2% of all such cases. The remaining 93.8% of cases were resolved by plea. *Sourcebook of Federal Sentencing Statistics* (Table 11) (1999). In each year since, the number and percentage of trials declined. By 2002, there were only 766 drug trafficking trials nationwide, 3% of such cases. *Id.* (2000 - 2002).[9] This reduction in trials

[9] The reduction in drug trafficking trials is a consistent downtrend, not a snapshot anomaly:

Primary Offense: Drugs - Trafficking

FY	Total	Plea		Trial	
		Number	Percent	Number	Percent
1999	21,840	20,481	93.8%	1,359	6.2%
2000	23,195	22,011	94.9%	1,184	5.1%
2001	24,016	23,204	96.6%	812	3.4%
2002	25,361	24,595	97.0%	766	3.0%

Sourcebook of Federal Sentencing Statistics (Table 11) (1999 - 2002).

occurred even though the overall number of drug trafficking prosecutions increased, from 21,840 in 1999, to 25,361 in 2002. These statistics belie the myth that *Apprendi*-specific indictments will lead to catastrophic increases in federal court workloads. To the contrary, if any conclusion may be drawn from the data, it is that such indictments more sharply focus the issues in ways that contribute to successful plea negotiations.[10]

Not only is the thought that *Blakely* will increase trials statistically unsupported, but it is also counterintuitive, as the Guidelines continue to offer significant benefits for those defendants who accept responsibility for their criminal involvement.[11] Some would say these benefits are penalties, because they are withheld from most who elect trial over plea, and those who go to trial are further penalized if their evidence is disbelieved.[12] But, whether viewed as benefits or penalties, they serve to discourage frivolous demands for trial. Moreover, explicit indictments are more likely to encourage plea

[10] This is not to say that federal courts lack capacity to conduct additional criminal trials. While federal courts conducted 1,851 criminal trials in 2002, fewer judges conducted 2,958 criminal trials in 1999 and 3,124 in 1995. *Sourcebook of Federal Sentencing Statistics* (2002) (Table 10); *id.* (1999) (Table 10); *id.* (1995) (Table 16).

[11] *See, e.g.*, U.S.S.G. § 3E1.1 (permitting 2-level reduction in offense level for demonstrating acceptance of responsibility and an additional 1-level reduction for timely notifying authorities of the intention to plead guilty); *id.* §§ 2D1.1(b)(6), 5C1.2 (safety valve, permitting a 2-level offense level reduction and a sentence below a mandatory minimum sentence for qualifying defendants who truthfully disclose all information and evidence concerning offenses part of the same course of conduct).

[12] *See* U.S.S.G. § 3C1.1 (permitting 2-level increase in offense level for obstruction or impeding the administration of justice, including offering false testimony at trial).

negotiations, and to permit the parties to compromise on enhancing facts when proof of a single fact is inadequate or questionable, without fear that the issue will re-emerge in a presentence report written by a non-lawyer probation officer unfamiliar with the realities of trial, rules of evidence, subtleties of proof, and ethical constraints imposed upon the prosecutor as a "minister of justice."[13]

A defendant's election to plead guilty or to stand trial is influenced not by the specificity of the indictment, but rather by the certainty and magnitude of punishment set forth in the Guidelines. Before *Apprendi* was decided, that certainty was often lacking for defendants in drug cases, who "would routinely see [their] maximum potential sentence balloon from as little as five years to as much as life imprisonment . . . based . . . on facts extracted after trial from a report compiled by a probation officer . . . ." *Blakely*, 124 S. Ct. at 2542. The increased specificity that *Apprendi* required led to greater certainty, and, as a result, enhanced opportunities for knowing

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[13] *See, e.g., United States v. Young*, 470 U.S. 1, 26 (1985) (Brennan, Marshall, Blackmun, JJ., concurring in part and dissenting in part) ("[W]e have long emphasized that a representative of the United States Government is held to a *higher* standard of behavior:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . .

(*Cf.* ABA Model Rules of Professional Conduct, Rule 3.8 comment (1984) ('A prosecutor has the responsibility of a minister of justice and not simply that of an advocate'); ABA Model Code of Professional Responsibility EC 7-13 (1980) (prosecutor owes a 'special duty'); ABA Standard for Criminal Justice 3-5.8, p. 3•88 (2d ed. 1980)").

settlement. After *Blakely*, the indictment must include other facts that increase the statutory maximum, thus providing even greater certainty. Given past experience, there is no reason to believe that *Blakely*-specific indictments will cause an increase – much less a catastrophic increase – in trials; rather, the more specific allegations give the parties specific details with which to reach successful compromise and negotiations.

C. In the remaining 3% of federal sentencings – those following trial – the only additional requirements of *Blakely* are that the prosecution prove the alleged facts beyond a reasonable doubt, that juries be properly instructed on the law, and that verdict forms reflect findings on relevant enhancing facts, all of which are readily accomplished under present procedures.

The remaining 3% of sentencings will likely follow a jury or non-jury trial. In some of those cases, the prosecution will offer proof of enhancing facts and the jury will be instructed to make relevant findings on its verdict form. Commentators have speculated wildly about the difficulties attendant to these requirements, but there are neither legal nor practical impediments to *Blakely*-ized trials.

The Constitution has two provisions relating to criminal trials. The first is in the article allocating federal judicial power: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2. The second is in the Bill of Rights: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. These provisions are given effect by Federal Rule of Criminal Procedure 23: "If the defendant is entitled to a jury trial, the trial must be by a jury" unless waived by the

defendant with the consent of the government and the court's approval. Absent waiver, *Blakely* entitles a defendant to a jury trial to decide enhancing facts that increase the statutory maximum, so, by their terms, the Constitution and rules authorize such a proceeding.

In addition, "[n]othing in the Constitution or the Rules precludes the judge from granting a jury trial as a matter of discretion." *Ross v. Bernhard*, 396 U.S. 531 (1970) (Stewart, Burger, Harlan, JJ., dissenting); *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252 (S.D. Fla. 2004) (Jordan, J.) (granting jury trial, as a matter of discretion, for organization charged with misdemeanor, based on review and discussion of historical precedent); *United States v. Beard*, 313 F. Supp. 844, 846 (D. Minn. 1970) (Neville, J.) (the "granting of a jury trial rests within the court's discretion" where petty offense defendants have no constitutional right to jury trial and Congress has not spoken on subject).

The government relies on *United States v. Jackson*, 390 U.S. 570 (1968), for a contrary view. Pet'r Br. at 60-61. *Jackson*, however, is distinguishable in many ways that leave it with little weight or precedential value in this setting. *Jackson* held unconstitutional a federal death penalty law that could only be imposed upon those convicted of kidnaping after trial, but not on those who pleaded guilty. In an effort to salvage the federal statute, the government suggested that those who plead guilty should, despite their objection and the fact that Congress had not authorized such a procedure, be subjected to a death penalty phase jury. The Court rejected the government's attempt to create out of whole cloth a procedure to impose the death penalty on those who plead guilty.

In nearly every respect, *Jackson* differs from *Blakely*. Most prominently, *Jackson* was about the power of a court to empanel a jury *after* a guilty plea; *Blakely* requires no such procedure. Nothing *Blakely* requires occurs outside of the traditional setting of a criminal proceeding, whereas the government's rejected salvage in *Jackson* attempted to create a unique post-guilty plea sentencing jury for which Congress made no provision. In short, assimilating *Blakely* does not require that new sentencing juries be created out of whole cloth; it merely requires that when defendants elect trial instead of plea, the jury's factfinding include certain facts that may influence the statutory maximum sentence in the event of conviction.

In addition, *Jackson* has little bearing in a non-death penalty setting, as the ruling certainly derives from the Court's "death is different" jurisprudence of that era.[14] In *Jackson*, the government wanted the post-guilty plea jury empaneled to impose a punishment "different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); under *Blakely*, the jury decides if the statutory maximum sentencing range for a single type of punishment should be higher or lower. Under *Jackson*, the jury was to be empaneled as a sword, to invoke a different and much more serious penalty; under *Blakely*, the

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[14] *See Schiro v. Farley*, 510 U.S. 222, 237 (1994) (Blackmun, J., dissenting) ("The 'unique' nature of modern capital sentencing proceedings . . . derives from the fundamental principle that death is 'different,' *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2992, 49 L. Ed. 2d 944 (1976) (plurality opinion); *see also Furman v. Georgia*, 408 U.S. 238, 306, 92 S. Ct. 2726, 2760, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)").

jury right is a shield to protect the defendant from an increase in the statutory maximum for the same type of punishment, absent sufficient proof. In *Jackson*, the defendant objected to the penalty jury (because it could not help, but only hurt his lot); but under *Blakely*, the jury serves to protect the defendant from increased punishment based on facts proved only to a probation officer. And, under *Blakely*, a defendant can plead guilty to avoid the jury and its potentially more severe punishment, relief not available under the government's formulation in *Jackson*.

In the context of *Blakely*, there is no constitutional provision, statute, or rule prohibiting the jury from hearing enhancement factors contained in the indictment. Given an indictment alleging enhancement factors and a jury empaneled to try the case, the government is certainly authorized to introduce evidence in an effort to prove its allegations beyond a reasonable doubt. *See, e.g.*, *United States v. Taylor*, 17 F.3d 333 (11th Cir. 1994) (permitting government to introduce relevant evidence to prove charges in the indictment); *United States v. Scop*, 940 F.2d 1004 (7th Cir. 1991) (same); *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir. 1991) (same); *United States v. Kaplan*, 886 F.2d 536, 549 (2d Cir. 1989) (same); *United States v. Finestone*, 816 F.2d 583, 587 (11th Cir. 1987) (same); *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986) (same).

Enhancing fact evidence is comparable to many types of evidence presently admitted in federal trials, independent of *Blakely*. Evidence of intrinsic acts (sometimes denominated "*res gestae*" evidence) is admissible, because it is "inextricably intertwined with the charged offense . . . ." 2 *Weinstein on Evidence* § 404.20[2][b] (2d ed. 2004); *see, e.g.*, 18 U.S.C. § 924(c)(1)(a) (evidence of use, brandishing, or discharge of deadly or dangerous weapon or firearm is proved at trial in

relation to crime of violence or drug trafficking crime). A significant variety of extrinsic evidence is also admissible. 2 *Weinstein* § 404.20[2][c]; *see, e.g.*, *Taylor*, 17 F.3d at 338 (admission of evidence of uncharged Ecstasy in support of cocaine conspiracy); *Scop*, 940 F.2d at 1008-09 (admission of evidence of uncharged stock manipulation in securities fraud case); *Gonzalez*, 921 F.2d at 1546 (evidence of defendant's uncharged activities as a pilot admissible to prove RICO charge); Fed. R. Evid. 404(b) (evidence of other wrongs and acts admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake).

Certainly, the jury can be instructed on the law and can return verdicts with appropriate findings on those facts. Jury instructions can be readily adapted from the U.S. Sentencing Commission's *Guidelines Manual*. Adapting verdict forms to reflect the jury's appropriate findings has precedent in precisely this area. "There are classes of cases . . . where special verdicts appear to be essential if the court is to exercise its sentencing powers upon conviction." 26 *Moore's Federal Practice, Criminal Procedure* § 631.03[2] (3d ed. 2004) (citing *United States v. McNeese*, 901 F.2d 585, 605-06 (7th Cir. 1990); *United States v. Stassi*, 544 F.2d 579, 583 (2d Cir. 1976)). Such forms are especially appropriate where, under the charged conduct, there are "varying penalties," or "penalties differ," or a "single act [is] committed by alternative means" *Id.* (citing cases).

Even the current *Guidelines Manual* recognizes that special verdict forms are appropriate for a proper sentencing, at least in the case of hate crimes. In such cases, the *Manual* states, the jury must make a specific verdict finding, beyond a reasonable doubt, that the defendant selected the victim because of race, color, religion, national origin, ethnicity, gender, disability, or

sexual orientation. U.S.S.G. § 3A1.1(a) (Nov. 2003). And, at least since *Cotton*, verdict forms in federal narcotics prosecutions have required jurors to designate drug type and quantity. Otherwise, the enhanced statutory sentence range cannot be applied.

As in the case of *Blakely*-compliant indictments, real-world practice proves that *Blakely*-complaint jury trials are readily assimilated into federal criminal practice. Consider, for example, *United States v. Carlos Cardenas, et al.*, Case No. 03-20450-CR-GOLD(s) (S.D. Fla.), *available at* http://pacer.flsd.uscourts.gov (Local Option Images). This multi-defendant, multi-count, money laundering and MDMA/Ecstasy distribution conspiracy prosecution was completed less than a month after *Blakely* was decided, yet both the government and the district judge readily adapted to its requirements. The government introduced evidence to support enhancement facts, the court instructed the jury, fashioned appropriate special verdicts, and a portion of the verdict was returned in bifurcated jury deliberations. Three defendants were convicted of all counts, *id.* at docket entry ("DE") 657-59; one defendant had split verdicts, convicted on some counts and acquitted on others, *id.* at DE 660; and one defendant was acquitted of all counts, *id.* at DE 655. The guilty verdict forms required special findings, including a multiple-choice selection from many possible ranges of pill quantity, corresponding to the possibilities under U.S.S.G. § 2D1.1; the jury chose an appropriate pill quantity range on the guilty verdict forms. *Id.* at DE 657-60. The money laundering verdicts required the jury to select the means, knowledge, and intent with which the crimes were committed, as well as to choose the value of the laundered funds, from a list comparable to the Guidelines ranges; the jury again made appropriate selections. *Id.* at DE 657-59. After the initial verdicts were returned, the district court had the jury deliberate

again, this time to deliver special jury verdicts concerning the amount of funds laundered, another fact that determines guidelines sentencing. The jury deliberated and filled in by hand the amounts relating to each count: $11,340.00, $3,250.00, and $14,5990 on one verdict; $0 on the other.

The trial lasted 25 days. *Id.* at DE 661. The first jury deliberation was completed in less than two trial days, while the bifurcated second stage lasted a day. *Id.* at DE 661, 665. The only jury instructions added to satisfy *Blakely* were these two brief passages. First:

> If you find the defendant guilty of this count, you are further instructed to select the number of pills attributable to the defendant on the verdict form. The number of pills attributable to the defendant is the actual number of pills the defendant possessed.

Id. at DE 653, Inst. 13 (conspiracy to possess with intent to distribute MDMA/Ecstasy), Inst. 15 (possession with intent to distribute MDMA/Ecstasy). Second:

> In the verdict form you will be asked to specify the amount of currency involved in each count that you find the defendant guilty of violating. Obviously, if you find the defendant "not guilty" it will not be necessary for you to specify any amount.

Id. at DE 653, Inst. 17A (money laundering and conspiracy to money launder).

None of this should be surprising. Jurors in federal civil cases are called upon to decide individual liability, to determine loss or damages, and to apportion responsibility. Often, those

are complex cases. Yet, there is no surprise when jurors fulfill their duty in the civil case setting.

There may, of course, be cases in which the enhancement evidence becomes unduly prejudicial, making it difficult for jurors to render impartial verdicts. But such concerns have long been addressed in the federal courts. *See* Fed. R. Evid. 403 (authorizing court to exclude relevant evidence if unduly prejudicial). In the event that required enhancement evidence threatens to prejudice the determination of guilt or innocence, the district court and defendant have two options, stipulation to the fact (if that is appropriate) under *Old Chief v. United States*, 519 U.S. 172 (1997) (holding it an abuse of discretion under Rule 403 to disallow defendant's stipulation to prior felony convictions where such convictions are an element of the offense), or bifurcation of the trial.

A district court's authority and discretion to bifurcate a trial stem from two sources. First, Federal Rule of Evidence 611(a) gives a court the authority to control the mode and order of the presentation of evidence. *Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."). Second, Federal Rule of Criminal Procedure 14(a) gives a court authority and discretion to control the format of a trial, providing that the Court "may order separate trials of counts . . . or provide any other relief that justice requires." *See Zafiro v. United States*, 506 U.S. 534, 538-39 (1993) (Rule 14 "leaves the tailoring of the relief to be granted [on a motion to sever], if any, to the district court's sound discretion"); *see also United States v.*

Joshua, 976 F.2d 844, 847-48 (3d Cir. 1992) (approving district court's decision to bifurcate, rather than sever, felon-in-possession count from armed bank robbery count); *United States v. Carlson*, 423 F.2d 431, 435 (9th Cir. 1970) (in reviewing district court's refusal to bifurcate one defendant's insanity defense from other defendants' general "not guilty" defense, stating that "[t]he trial court undoubtedly had authority to bifurcate the trial if it had wished to do so").

Blakely assimilates into the sentencing process as well. Admittedly, the Sentencing Commission thought that judges should make many of the findings that *Blakely* allots to juries. But nothing in the Sentencing Reform Act of 1984 required the precise federal sentencing guidelines now in effect. The choice of judicial factfinding, instead of jury factfinding, was simply a philosophical choice of the United States Sentencing Commission to adopt a "real offense" system instead of a "charge-offense" system. *See* United States Sentencing Commission, *Guidelines Manual* § 1A1.1, comment. (Chapter One – Introduction and General Application Principles) (Nov. 2003) at 4-5. The Commission chose, as a matter of policy, a preponderance of evidence standard for factual disputes because it predicted that the lesser standard "is appropriate to meet due process requirements." U.S.S.G. § 6A1.3, p.s., comment. It could have chosen jury factfinding and the reasonable doubt standard that *Blakely* now requires. To be sure, neither the Act nor the guidelines prevent the jury findings required by *Blakely*.

For those many cases in which no shift in maximum sentence can occur, the guidelines continue to operate as before. For those few cases in which a shift does occur as a result of a jury finding, the guidelines also continue to operate as before, except the jury's findings lock in the statutory maximum

sentence.[15] *Blakely*'s requirements are consistent with both the enabling legislation and the guidelines.

Similarly, nothing in Federal Rule of Criminal Procedure 32 prohibits the assimilation of *Blakely*. For those cases without possibility of an increased statutory maximum, the rule functions as before. For those cases in which the jury makes a positive finding for an indicted enhancement factor, the rule also functions as before. And for those cases in which the jury makes a negative determination, the judge is bound by that decision in setting the statutory maximum sentence, eliminating any need for a judicial determination because "the matter will not affect sentencing." Fed. R. Crim. P. 32(i)(3)(B); *see* U.S.S.G. § 5G1.1(a) (guideline range cannot exceed "statutorily authorized maximum penalty").

Only some of the 3% of sentencings that follow a trial will involve any enhancing facts[16] and only those are affected by the trial requirements of *Blakely*. For them, the government must prove its case beyond a reasonable doubt, and the jury (or judge, in a non-jury trial) must make findings about the indictment's allegations. There is nothing in the law or structure of the criminal justice system that prevents these processes.

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[15] The judge does, however, retain authority to pretermit or override the jury's verdict, based upon insufficiency of evidence, under Federal Rules of Criminal Procedure 29, 33 and 34.

[16] Many offenders do not receive upward adjustments to their base offense levels. Very few offenders – less than 1% in most categories – receive upward adjustments under Chapter Three. *Sourcebook of Federal Sentencing Statistics* (2002) (Table 18). Upward departures under Chapter Five also occur very rarely, in only 0.8% of cases. *Id.* (Figure G).

D. Rather than cause chaos, applying *Blakely* to guidelines practice enhances the accuracy, integrity, and public reputation of sentencing in federal courts.

"There is always in litigation a margin of error, representing error in factfinding . . . ." *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In a criminal case, "this margin of error is reduced by . . . persuading the factfinder . . . beyond a reasonable doubt." *Id.*, *cited with approval in In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 364, *cited with approval in Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972). This state of certitude is just as valuable in the determination of punishment as it is in the determination of guilt or innocence. "The genius of our criminal law is violated when punishment is enhanced in the face of a reasonable doubt as to the facts leading to enhancement." *People v. Reese*, 179 N.E. 305, 308 (N.Y. 1932) (Cardozo, C.J.).

Blakely promotes accuracy in sentencing precisely because it requires factfinding beyond a reasonable doubt. Accuracy in factual determinations that may alter the statutory maximum sentence reduces unwarranted sentencing disparities, honoring one of the overriding objectives of Congress in adopting a guidelines system. Applied to the federal guidelines, *Blakely* ensures that defendants tried and convicted of similar crimes will receive similar sentences. In doing so, *Blakely*'s application enhances the integrity and public reputation of federal sentencing proceedings.

CONCLUSION

Based upon the arguments and citations of authority of the respondents and *amici*, it is respectfully requested that the Court apply the principles of *Blakely v. Washington* to practice under the United States Sentencing Guidelines.

Respectfully submitted,

NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
Carol A. Brook, *President*
Henry J. Bemporad
Frances H. Pratt, *Co-Chairs*,
Amicus Committee

PAUL M. RASHKIND
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
150 West Flagler Street, Ste 1500
Miami, Florida 33130
(305) 536-6900

September 2004